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IDAHO PUBLIC
UTILITIES COMMISSION

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November 15, 2013

Via Hand Delivery

Jean Jewell, Secretary
Idaho Public Utilities Commission
472 W. Washington St.
Boise, Idaho 83720

Re: IPC-E-13-16—Snake River Alliance

Dear Ms. Jewell:

Enclosed for filing, please find an original and seven (7) copies of Snake River Alliance's Post Hearing Brief.

Kindly return a file stamped copy to me.

Very Truly Yours,

McDevitt & Miller LLP

Dean J. Miller

DJM/hh
Encl.

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Attorneys for the Snake River Alliance

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF IDAHO POWER COMPANY'S APPLICATION FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY FOR THE INVESTMENT IN SELECTIVE CATALYTIC REDUCTION CONTROLS ON JIM BRIDGER UNITS 3 AND 4	**Case No. IPC-E-13-16** **POST HEARING BRIEF OF SNAKE RIVER ALLIANCE**

Pursuant to the Commission's *Revised* Notice, Order No. 32912 dated October 24, 2013, the Snake River Alliance ("SRA" or "Alliance") respectfully submits this Legal Brief. This Brief supports the Alliance's recommendation for the Commission's decision which is: If a certificate of public convenience and necessity is issued, it should include the conditions that (1) the Commission does not make a finding as to the prudence of the proposed investments; (2) the Commission does not make a binding ratemaking commitment.

ARGUMENT

A. The Evidence at Hearing.

To put the following legal argument in context, and as will be discussed in more detail below, two primary evidentiary facts emerged from the testimony at the November 7, 2013, technical hearing:

First, there is substantial political and regulatory uncertainty with associated economic risk regarding coal-fired electric generation. No party disputed this fact and there is no evidence pointing to a contrary conclusion.

Second, binding ratemaking treatment under Idaho Code §61-541 is not necessary or required in order to finance the proposed investments. Although Company witnesses made generalized and unpersuasive assertions to the contrary, the preponderance of evidence supports a finding to this effect.

B. The Statutes.

The statutory provisions governing the Commission's decision are Idaho Code §61-526 and §61-528, relating to Certificates of Public Convenience ("CPCN"), and §61-541, relating to binding ratemaking treatment. [1]

C. A CPCN is a Flexible Document That Can be Tailored to the Facts of Particular Cases.

Idaho Code §61-526 and §61-528 were part of Idaho's original public utility law adopted in 1913 and they reflect the now archaic approach to statutory drafting common at the time. Most critical to this case, however, is the final phrase of Idaho Code §61-528 which provides that in granting a CPCN, the Commission "...may attach to the exercise of the rights by said

[1] For convenience, the text of Idaho Code §§61-526, 528 and 541 is attached as Exhibit A.

certificate *such terms and conditions as in its judgment the public convenience and necessity may require"* (emphasis added).

This phrase necessarily implies that a CPCN does not have a fixed legal meaning, applicable to all cases, but by adding terms and conditions, the Commission may tailor a CPCN to the facts of particular cases. So, at one end of the spectrum a CPCN could merely constitute an acknowledgement that the proposed investments are in facilities of a type consistent with Idaho Power's electric utility business (as opposed, say, to investments in pork belly futures or wagers on Boise State football games). A CPCN thus conditioned would not carry with it a finding of prudence or an assurance of any particular ratemaking treatment. This could be viewed as a "weak" CPCN. At the other end of the spectrum a CPCN could carry it with as a term or condition a finding of prudence and an assurance of future ratemaking treatment under Idaho Code §61-541. This could be viewed as a "strong" CPCN.

Commission precedent supports the view that a CPCN is a flexible document and may carry with it a range of conditions ranging from weak to strong. In the early 1990's, in a series of cases, IPCo applied for CPCNs and ratemaking assurances in conjunction with FERC relicensing of its Snake River hydroelectric projects. In the first of those cases, Milner and Swan Falls, the Commission solicited comments on the rate implications of granting a CPCN and concluded that a CPCN does not have a fixed meaning for all cases and the degree of rate assurance can vary with the circumstances of each case:

> "Indeed, it would be unwise to attempt a "bright line" definition of the rate implications of a certificate of public convenience and necessity. Idaho Power's projects can and do vary dramatically. The risk inherent in constructing a coal-fired or nuclear facility are greater in magnitude than those involved in construction of Snake River hydro." Order No. 23529, Pg. 25, Case No. IPC-E-90-08 (Milner).

> "It should be made clear, however, that the Commission has not adopted for all future cases a fixed or binding definition of the legal effect of a certificate of public convenience and necessity." Order No. 23520, Miller Concurring, Pg. 2, Case No. IPC-E-90-02 (Swan Falls).

The foregoing demonstrates the Commission has ample legal authority to include within a CPCN the conditions recommended by the Alliance.

D. Idaho Code §61-541 is Intended to Reduce Financial Risk of Major Investments, not Insulate from Regulatory or Political Risk.

Section §61-541 was added by the Legislature to the public utility law in 2009. S.L. ch. 145, Sec 1, p. 436, S 1123. The legislative history associated with S 1123 makes it clear that the central purpose of the act was to facilitate financing of major transmission or generation projects. The Statement of Purpose accompanying S 1123 provided in part:

> "At a time when financial markets are risk averse and utilities are embarking on major transmission and generation projects to serve growing loads, this legislation helps provide the stability necessary to attract investors at a more reasonable cost of capital...It also provides additional surety to capital markets that utility expenditures are prudent and pose less risk of financial loss." [2]

Legislative testimony by proponents of S 1123 confirms this central purpose.[3]

Since the enactment of Section 61-541, the Commission has assured binding ratemaking treatment on only one occasion—in connection with the Langley Gulch generating facility. Case No. IPC-E-09-03, Order No. 30892. The circumstances surrounding *Langley*, however, were much different from the circumstances of the present case. In 2009, the general economy was poor and financial markets were in disarray. In the absence of rate assurances, financing was unlikely. The size of the financial investment relative to IPCo's capitalization was large. The

[2] A full copy of the Statement of Purpose is attached as Exhibit B.
[3] The minutes of the Senate State Affairs Committee of March 24, 2009 is attached as Exhibit C.

time required to construct the project was much longer than that required to install SCR systems.[4]

E. The Commission Should Not Use Section 61-541 to Shift Regulatory and Political Risk to Ratepayers.

As noted above, the evidence at hearing was clear that binding ratemaking treatment is not required to secure financing of the proposed investments. Company Witness Youngblood testified:

> "But financing risk is not the primary reason the Company seeks preapproved ratemaking treatment—the current social and regulatory risk associated with coal-fired investments is."[5]

Staff Witness Louis acknowledged on cross-examination that the Company had not made a compelling case that binding ratemaking treatment is necessary to secure financing.[6]

Idaho Power Company is financially healthy, not in financial distress:

> "IDACORP's third quarter operating results continue to demonstrate the strength of our underlying operations and we remain on track for a sixth consecutive year of improved earnings."[7]

Idaho Power is capable of financing the investments in conjunction with its general capital budget.[8]

The evidence was equally clear, and undisputed, that regulatory and political risk of future environmental regulation may significantly alter the economics of coal fired generation. For example, the United States Environmental Protection Agency has announced its intention to

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[4] *See* SRA cross examination of Witness Youngblood, SRA Hearing Exhibit 408.
[5] *See* Youngblood, Reb. Pgs. 11-12.
[6] *See* SRA cross examination of Witness Louis.
[7] SRA Hearing Exhibit 409, IdaCorp Third Quarter Earnings Release.
[8] SRA Hearing Exhibits 406, 407.

promulgate rules for carbon pollution reduction for existing power plants to be effective June 2015.[9] As SRA Witness Miller testified:

> "It is now established by federal court decisions that carbon dioxide (CO2) is subject to regulation as a pollutant under the Clean Air Act. It is also clear that the current presidential administration intends to regulate carbon from new and existing power plants. On September 20, 2013, EPA issued proposed New Source Performance Standard regulations for Greenhouse Gas (GHG) emissions from new coal plants and stated it would issue proposed rules by June of 2014 for existing coal-fired power plants. Furthermore, according to the utility trade group the Edison Electric Institute, (http://www3.eei.org/meetings/Meeting%20Documents/2009-06-22_GCC_IntlElecPartnership-CCStimelineFINAL031809.pdf), the technology to "capture" and "sequester" CO2 emissions from generating units on the scale of a utility coal plant has not been deployed, and will not be for a number of years. That further exposes utilities and their customers to additional unknown risks from carbon restraints beginning as soon as 2015. Failure to consider the probability of CO2 controls in the not-too-distant future raises serious questions about the prudency of making an investment of this magnitude at this time."[10]

The effect of binding ratemaking treatment under Section 61-541 is to irrevocably and prematurely shift these regulatory risks away from the utility and onto ratepayers. Section 61-541 is intended to alter the traditional regulatory model and allow pre-construction risk shifting in only one circumstance—when necessary to obtain project financing. The Commission should reject the Company's proposal to use Section 61-541 for a purpose not intended by the legislature.

F. The Company's Evidence Relating to the Evaluation Criteria Contained in Section 61-541 is Weak.

Underscoring the Alliance's legal objections to the use of Section 61-541 in this circumstance is the fact that the Company's evidence relating to the evaluation criteria in Section 61-541 is not persuasive.

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[9] SRA Hearing Exhibit 403.
[10] SRA Witness Miller, Di. Pg. 8.

Section (4)(a)(i) requires the Commission to consider whether the utility has in effect a Commission accepted Integrated Resource Plan. It is undisputed that IPCo filed its 2013 Integrated Resource Plan ("IRP") on the same day it filed the present case.[11] The Commission has not yet concluded its review of the IRP and has neither acknowledged it nor taken any other action with respect to it.

Sections (4)(a)(iii) and (iv) require the Commission to determine whether the utility has considered other sources of long-term supply and the use of energy efficiency, demand side management and alternative sources. Other recent proceedings make it clear that the Commission takes this criteria seriously. In Case No. PAC-E-13-05 the Commission reviewed PacifiCorp's 2013 Integrated Resource Plan. In Order No. 32890, the Commission expressed skepticism regarding PacifiCorp's over-reliance on coal and under-reliance on alternatives. Recognizing future uncertainty of environmental requirements, the Commission said:

> "In light of this uncertainty, it appears to be in the best interest of the Company and its customers to continue to evaluate and devote more focus on the development of alternative energy sources....In future IRP and DSM filings, the Commission directs the Company to present clear and quantifiable metrics governing its actions regarding decisions to implement or decline to implement energy efficiency programs". Order No. 32890, Pgs. 11-12.

If Idaho Power has considered other resources as required in these sections, the evidence of that analysis is not reflected in this Application or direct testimonies from the Company, nor was it made clear during the course of cross-examination of Company witnesses. The coal study[12] introduced by Idaho Power does not show how energy efficiency or any other DSM measures, let alone renewable energy resources, were analyzed as replacement resources for

[11] Case No. IPC-E-13-15, filed July 1, 2013.
[12] Redacted Exhibit 5.

some or all of Idaho Power's Bridger resources and therefore the Commission is left with incomplete information.

CONCLUSION

Based on the reasons and authorities cited herein the Alliance respectfully requests that if a certificate of public convenience and necessity is issued, it should include the conditions that (1) the Commission does not make a finding as to the prudence of the proposed investments; (2) the Commission does not make a binding ratemaking commitment.

DATED this 15 day of November, 2013.

MCDEVITT & MILLER, LLP

By: _____
Dean J. Miller
Attorneys for Snake River Alliance

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of November, 2013, I caused to be served, via the method(s) indicated below, true and correct copies of the foregoing document, upon:

Jean Jewell, Secretary Idaho Public Utilities Commission 472 West Washington Street P.O. Box 83720 Boise, ID 83720-0074 jjewell@puc.state.id.us	Hand Delivered U.S. Mail Fax Fed. Express Email	X
Kris Sasser Deputy Attorney General Idaho Public Utilities Commission 472 W, Washington (83702) P.O. Box 83720 Boise, ID 83 720-0074 sasser@puc.idaho.gov	Hand Delivered U.S. Mail Fax Fed. Express Email	X
Lisa D. Nordstrom Idaho Power Company 1221 West Idaho Street (83702) P.O. Box 70 Boise, ID 83707 lnordstrom@idahopower.com	Hand Delivered U.S. Mail Fax Fed. Express Email	X
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BY: Heather Houle
McDEVITT & MILLER LLP

Idaho Statutes

TITLE 61
PUBLIC UTILITY REGULATION

CHAPTER 5
POWERS AND DUTIES OF PUBLIC UTILITIES COMMISSION

61-526. CERTIFICATE OF CONVENIENCE AND NECESSITY. No street railroad corporation, gas corporation, electrical corporation, telephone corporation or water corporation, shall henceforth begin the construction of a street railroad, or of a line, plant, or system or of any extension of such street railroad, or line, plant, or system, without having first obtained from the commission a certificate that the present or future public convenience and necessity require or will require such construction: provided, that this section shall not be construed to require such corporation to secure such certificate for an extension within any city or county, within which it shall have theretofore lawfully commenced operation, or for an extension into territory whether within or without a city or county, contiguous to its street railroad, or line, plant or system, and not theretofore served by a public utility of like character, or for an extension within or to territory already served by it necessary in the ordinary course of its business: and provided further, that if any public utility in constructing or extending its lines, plant or system, shall interfere or be about to interfere with the operation of the line, plant or system of any other public utility already constructed, or if public convenience and necessity does not require or will require such construction or extension, the commission on complaint of the public utility claiming to be injuriously affected, or on the commission's own motion, may, after hearing, make such order and prescribe such terms and conditions for the locating or type of the line, plant or system affected as to it may seem just and reasonable: provided, that power companies may, without such certificate, increase the capacity of their existing generating plants.

History:

[(61-526) 1913, ch. 61, sec. 48a, p. 248; substantially reen. 1915, ch. 62, sec. 2, subd. 48a, p. 155; reen. C.L., 106:106, C.S., sec. 2474; I.C.A., sec. 59-526; am. 1970, ch. 134, sec. 1, p. 327.]

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Idaho Statutes

TITLE 61
PUBLIC UTILITY REGULATION

CHAPTER 5
POWERS AND DUTIES OF PUBLIC UTILITIES COMMISSION

61-528. CERTIFICATE OF CONVENIENCE AND NECESSITY -- CONDITIONS. Before any certificate of convenience and necessity may issue[,] a certified copy of its articles of incorporation, or charter, if the applicant be a corporation, shall be filed in the office of the commission. The commission shall have power, after hearing involving the financial ability and good faith of the applicant and necessity of additional service in the community to issue said certificate as prayed for, or to refuse to issue the same, or to issue it for the construction of any portion only of the contemplated street railroad, line, plant or system or extension thereof, or for the partial exercise only of said right or privilege, and may attach to the exercise of the rights granted by said certificate, such terms and conditions as in its judgment the public convenience and necessity may require.

History:
[(61-528) 1913, ch. 61, sec. 48c, p. 248; am. 1915, ch. 62, sec. 2, subd. 48c, p. 156; compiled and reen. C.L. 106:108; C.S., sec. 2476; I.C.A., sec. 59-528.]

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Idaho Statutes

TITLE 61
PUBLIC UTILITY REGULATION

CHAPTER 5
POWERS AND DUTIES OF PUBLIC UTILITIES COMMISSION

61-541. BINDING RATEMAKING TREATMENTS APPLICABLE WHEN COSTS OF A NEW ELECTRIC GENERATION FACILITY ARE INCLUDED IN RATES. (1) As used in this section, "certificate" means a certificate of convenience and necessity issued under section 61-526, Idaho Code.

(2) A public utility that proposes to construct, lease or purchase an electric generation facility or transmission facility, or make major additions to an electric generation or transmission facility, may file an application with the commission for an order specifying in advance the ratemaking treatments that shall apply when the costs of the proposed facility are included in the public utility's revenue requirements for ratemaking purposes. For purposes of this section, the requested ratemaking treatments may include nontraditional ratemaking treatments or nontraditional cost recovery mechanisms.

(a) In its application for an order under this section, a public utility shall describe the need for the proposed facility, how the public utility addresses the risks associated with the proposed facility, the proposed date of the lease or purchase or commencement of construction, the public utility's proposal for cost recovery, and any proposed ratemaking treatments to be applied to the proposed facility.

(b) For purposes of this section, ratemaking treatments for a proposed facility include but are not limited to:

(i) The return on common equity investment or method of determining the return on common equity investment;

(ii) The depreciation life or schedule;

(iii) The maximum amount of costs that the commission will include in rates at the time determined by the commission without the public utility having the burden of moving forward with additional evidence of the prudence and reasonableness of such costs;

(iv) The method of handling any variances between cost estimates and actual costs; and

(v) The treatment of revenues received from wholesale purchasers of service from the proposed facility.

(3) The commission shall hold a public hearing on the application submitted by the public utility under this section. The commission may hold its hearing in conjunction with an application for a certificate.

(4) Based upon the hearing record, the commission shall issue an order that addresses the proposed ratemaking treatments. The commission may accept, deny or modify a proposed ratemaking treatment requested by the utility. In determining the proposed ratemaking treatments, the commission shall maintain a fair, just and reasonable balance of interests between the requesting utility and the utility's ratepayers.

(a) In reviewing the application, the commission shall also determine

whether:

(i) The public utility has in effect a commission-accepted integrated resource plan;

(ii) The services and operations resulting from the facility are in the public interest and will not be detrimental to the provision of adequate and reliable electric service;

(iii) The public utility has demonstrated that it has considered other sources for long-term electric supply or transmission;

(iv) The addition of the facility is reasonable when compared to energy efficiency, demand-side management and other feasible alternative sources of supply or transmission; and

(v) The public utility participates in a regional transmission planning process.

(b) The commission shall use its best efforts to issue the order setting forth the applicable ratemaking treatments prior to the date of the proposed lease, acquisition or commencement of construction of the facility.

(c) The ratemaking treatments specified in the order issued under this section shall be binding in any subsequent commission proceedings regarding the proposed facility that is the subject of the order, except as may otherwise be established by law.

(5) The commission may not require a public utility to apply for an order under this section.

(6) The commission may promulgate rules or issue procedural orders for the purpose of administering this section.

History:

[61-541, added 2009, ch. 145, sec. 1, p. 436.]

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STATEMENT OF PURPOSE

RS18716

At at time when financial markets are risk-averse and utilities are embarking on major transmission and generation projects to serve growing loads, this legislation helps provide the stability necessary to attract investors at a more reasonable cost-of-capital.

This bill establishes an additional process for consideration of utility capital expenditures by the Idaho Public Utilities Commission. It expands the Commission's ability to shape the resources in a utility's portfolio before construction of or commitment to such a resource. It also provides additional surety to capital markets that utility expenditures are prudent and pose less risk of financial loss. When this voluntary process is used, it will benefit utility customers through lower financing costs and create a more transparent system of resource selection.

FISCAL NOTE

There is no impact to the General Fund.

Contact:
Name: Senator Curt McKenzie
Office:
Phone: (208) 332-1000

MINUTES

SENATE STATE AFFAIRS COMMITTEE

DATE:	March 4, 2009
TIME:	8:00 a.m.
PLACE:	Room 204
MEMBERS PRESENT:	Chairman McKenzie, Vice Chairman Pearce, Senators Darrington, Geddes, Davis, Stegner, Fulcher, Stennett (Thorson), and Kelly
MEMBERS ABSENT/ EXCUSED:	None
NOTE:	The sign-in sheet, testimonies, and other related materials will be retained with the minutes in the committee's office until the end of the session and will then be located on file with the minutes in the Legislative Services Library.
CONVENE:	**Chairman McKenzie** called the meeting to order at 8:00 a.m.
S1123	**Paul Kjellander** from the Idaho Office of Energy Resources presented **S1123** to the Committee. **Mr. Kjellander** stated in the energy sector we are in a time and place in history where there is an abundance of risk and a lack of trust. That combination makes it very difficult for investor utilities to try and find the financing that is needed to help build the critical infrastructures needed to keep the lights on. That situation is even more critical as the utility companies have been downgraded by Wall Street analysts, and in some instances the rating is so low that it is just an inch above junk status. That means that access to investment dollars are tougher to come by and the cost of capital is much higher as a result. **Mr. Kjellander** said that interest rates are higher for projects and the customers end up paying more for energy to cover those costs. The reasons for lowering a utilities credit rating is due to concerns over regulatory risk as a factor. The concern is that regulators could disallow the utility's cost after the capital investment has been made. The potential to recover the investment is jeopardized and it represents more risk for the investment community than it is willing to take. **Mr. Kjellander** said this proposal will provide an opportunity to provide an additional layer of certainty in today's economy that is necessary to attract investment capital. At the same time it will provide a benefit to the customers. This bill will not diminish the Commission's authority, instead it supplements their authority with an optional regulatory process. This process has been used successfully in other states to facilitate and challenge the utility's proposal for generation and transmission. The bill also creates a regulatory process that is entirely voluntary for the utility and the Commission. Both have the option not to use the process. The bill will not change the authority the Commission has to determine the reasonableness and prudence of the utility's investment in generation and

transmission. It simply ensures that the Commission doesn't have to wait until the utility has already made the investment to make that determination. **Brent Gale** from Mid American authored the legislation in Iowa, and there are approximately fifteen states that have adopted this process and using it.

Senator Stegner said it has been suggested that **Mr. Kjellander** was not a fan of this legislation when he was a commissioner. **Mr. Kjellander** replied that he first heard of this concept about three years ago and at the time most of the utilities were in good shape and had access to capital. His feeling at that time was why now. It has now become apparent that we need to build both transmission and generation, which is very costly. At the same time the utilities have been downgraded. Previously the utility companies were perceived as gold and they were in everyone's retirement portfolios. Now the investor owned utilities are teetering on the edge of bankruptcy, so steps need to be taken to improve access to capital markets. **Mr. Kjellander** stated that having remembered this he decided to take another look at it. It does make good sense and it doesn't take away the authority of the commissioners.

Senator Thorson commented that it appears with the increased access to capital markets that the cost for the improvements will go down and that it should be passed on to the customer of that power. He asked **Mr. Kjellander** if that was correct. **Mr. Kjellander** responded yes, they hope that is correct.

Chairman McKenzie asked **Jim Kempton** if he wouldn't mind giving the Committee the Public Utility Commission's (PUC) perspective on this legislation.

Mr. Kempton, a Commissioner for the PUC stated that when the PUC first looked at this, they did not have a lot of background that went into the development of this. With communications between the PUC and the Office of Energy Resources (OER) they did acquire the model legislation. Initially the PUC had concerns that there wasn't a hearing process, and the direction for the responsibility of responding to the legislation made the PUC fully responsible for the provisions. There wasn't a common tie between the Commission and the utility responsibility with regard to the financing. A number of pieces needed to be worked out before the PUC came on board. **Brent Gale** from MidAmerican, talked to the PUC about the process and over time the Commission became more comfortable with the language and the purpose of the legislation. This is important due to the financial situation in the market right now.

Mr. Kempton said that seventy-five percent of the utilities have a rating of triple B. So the issues of how a utility will invest in capital, and how they will establish negotiations in purchases direct from wholesale marketers, needs to be addressed. There are two problems, the cost of bonds and whether or not there will be interest for becoming a shareholder in Idaho power. The question is can some of these costs be deferred to the rate payer, where the rate payer assumes more risk. The hearing process establishes the mechanism where an order is issued for a set of

circumstances by which the generating facility could be built. The guarantee would be passed on to the company and those costs would be passed to the rate payer, when the generator goes on line. This will not affect the rate payer until the power is available, and it assures Wall Street that the stipulation in the order will meet the financial needs of the company.

Senator Darrington asked **Mr. Kempton** what is different in this process? **Mr. Kempton** responded this legislation will prohibit the PUC from doing advance funding to the utilities or guaranteeing it. The PUC issues orders based on used and useful criteria, but with a Construction Work in Progress (CWIP) Program they can move forward. The forecasted cost of the plant can be incorporated into the cost ahead of the time when it is used and useful. This legislation will take it one step further. The PUC does not have the authority to do this without this legislation.

Vice Chairman Pearce asked what has happened to the ratings for the utility companies? **Mr. Kempton** replied the same thing that is troubling Wall Street. There was an excessive promise of monetary profits to investors rather than investing in a utility. Gradually there was pressure to invest in higher return investments and the utilities fell by the way side. In 2000, Idaho Power had a low A rating and only about twenty-five percent of the utility companies in the United States were at that level. With the energy crisis it has steadily changed, except for how the investment market works. **Mr. Kempton** said so it was the market, activity and some regulatory aspects that were impacting the utility. This legislation will provide greater commitment to the utilities that their investment will not be wasted in the process, and at the same time try to protect the rate payers. **Vice Chairman Pearce** asked **Mr. Kempton** if the legislation will impact the rate of return on investment? **Mr. Kempton** said that the PUC believes this process will help move the regulatory lag aspect on a rate case allowance, and there will be consistency as to how issues will be held and worked if something unusual happens in the process.

Senator Kelly asked **Mr. Kempton** if there is an unforeseen circumstance once the process starts, will it impact the rate payer instead of the utility? **Mr. Kempton** responded there would be an equal balance between the rate payer and the utility's responsibility. Hypothetically if there was a hearing, an order was issued to construct a utility and the utility invests money, they would expect a return to cover the process. If the project had to be terminated the utility should be allowed to recover their investment. The utility cannot however recover anticipated returns. There would be ramps installed in the order and then there would be a second review. It does not shift risk to the rate payer, but it does provide for the company to recover their investment. **Senator Kelly** said there are terms in this legislation that states the rate making treatment in the order "shall be binding on any subsequent commission proceeding, except as otherwise provided by law." She asked what does that mean? **Mr. Kempton** replied that it means once the order is issued, the terms are binding. If the Commission has included in their decision a condition that

is prohibited by law, than the statutory provision will be considered to override the provision.

Senator Geddes said it appears that the utilities will balance the infrastructure with the ability of the rate payers to pay. It could potentially force a burden on the rate payers where they cannot afford to pay the rates. He asked **Mr. Kempton** if there would be ramps so that the rate payer will not have to pay before they actually receive the benefit from the project. **Mr. Kempton** answered that the rates are not assigned to the rate payer until the facility is used and useful. The return on the investment to the utility may be incorporated into the rate, even though the rate payer would not have received any power from the facility. **Senator Geddes** asked **Mr. Kempton** is there some effort by the utility to come to the Commission and provide justification regarding the infrastructure they are going to develop? **Mr. Kempton** said that **Brent Gale** can better explain how this process really works. The hearing process will bring all the intervening parties together to address the proposal and through that process a fair, just, and reasonable decision will be made.

Senator Davis asked **Mr. Kempton** to walk through the process for nuclear transmission and how it would impact the rate payers. **Mr. Kempton** responded it will be the same process as he previously stated. The investment that the company has put into the project is fair, just, and reasonable if they get a return on the investment. It is not reasonable for the utility to assume they will receive a rate return based on an unfulfilled promise to generate power. **Senator Davis** said if the expenditure is substantially different from what was approved at the hearing, will it be protected by this. **Mr. Kempton** answered it would be protected by the order and off ramps could be added to take another look during the process. **Senator Davis** said the protection to the consumer is that the utility can only come back and ask for consideration based on the terms of the initial order. The order will provide the parameters within the money. **Mr. Kempton** said there is protection for both the utility and the consumer in the order that the Commission writes.

Senator Kelly asked **Mr. Kempton** to explain the CWIP process. **Mr. Kempton** responded in the CWIP process rates are put into the account ahead of the completion of construction. In this legislation the rates are not assessed until the project is used and useful. **Senator Kelly** asked why doesn't the CWIP program address the lack of capital issue. **Mr. Kempton** replied because the way the legislation is constructed, it works for short term projects where the Commission can forecast what the project is going to be at the end. In CWIP the risk to the rate payers is not worth incorporating something into rates ahead of time. **Senator Kelly** said then this is effectively incorporated into the rates because of the lack of the ability to go back. **Mr. Kempton** said they can go back as long as it is incorporated in rates ahead of time. The used and useful concept to the utility is the foundation when decisions are made. CWIP moves the Commission out of the comfort zone, and the benefit has to be demonstrated to move away from used and useful.

Senator Davis asked **Brent Gale** to comment on some of the parameters that are built into the bill for the benefit of the consumer.

Brent Gale, Senior Vice President of MidAmerican Energy Holdings Company, stated that the company owns a number of regulated utilities, including Rocky Mountain Power, Pacific Power, and PacifiCorp. Through the holding company they construct and operate merchant generation and merchant transmission. **Mr. Gale** said that utilities, consumers and regulators are faced with some very difficult decisions today regarding the types of generation and size, as well as the type and size of transmission. A modest sized generation plant will cost one billion dollars or more. Five hundred miles of transmission line will also cost about that. The traditional regulatory process that existed in Iowa before 2001, and that exists here today, is for the utility to make the decision of what to add. It could be wind generation, geothermal, coal, gas or transmission. There is some regulatory process prior to the utility making that determination, but it is not a binding process. The regulators do not look at a specific investment and determine if it is the right size, type or cost. That review does not occur until after the utility has already spent the money.

Mr. Gale stated that this bill will not supercede that process. This bill will provide an optional process that is voluntary. The process will be the same except it moves the review process to the front before the spending ever occurs. The utility can propose it, the Commission uses the process, and the bill requires a hearing where all parties can participate. In the end the Commission will make the determination for the utility to move forward or not.

Senator Davis said there is another alternative. The Commission would not prejudge the proposal and would make the decision later. It would be added into the rate base after completion of the project. **Mr. Gale** responded that is exactly right. There are three options specifically in the bill. The Commission can authorize or grant the utility rate making principles, they can deny all of them, or the Commission can modify it. If denied, they are basically telling the utility if you want to build this go ahead, but you are fully at risk. They will review it after construction is completed four or five years down the road.

Senator Kelly said under the conditions set forth in the bill, if the Commission chooses to deny the proposal they would have to justify it. A record for denial would be needed. They can't deny it without being subject to challenge from the utility. **Mr. Gale** stated that is true for all actions taken by the Commission. The Commission's decision must be based on the record. If the proceeding does not require a record then the decision is looked at somewhat differently. This bill will not change that process at all.

Mr. Gale said this bill will not change rates. The Commission will issue an order under this bill, which will approve or modify rate making principles that are proposed by the utility. Section 4(b) urges the Commission to issue the decision before the utility starts spending money and that is the purpose for this whole process. The regulators and the consumers will

have a say in what the utility is doing before they spend any money. The order needs to be issued before the utility starts construction. It does not mandate it and the rates will not change until there is a rate case. **Mr. Gale** said he believes this is a good regulatory process and a good tool to have in today's economy.

Senator Darrington said as he understands the process it will be reviewed by the PUC, and at the same time the financial applications will be made to fund it. The hope is that it would have a successful conclusion in a timely way to have the funding and a competitive interest rate. He asked **Mr. Gale** if that is correct. **Mr. Gale** answered in Iowa the utility goes to the regulator first for a decision, then they get the financing. They do have to do certain things first, such as determining the costs. After that determination is made they go back to the regulator for final approval and then finalize the terms and conditions. **Mr. Gale** said if they bring the plant under the actual cost, that is the cost that goes into the rates. If they go over, then the utility has to prove in a rate case that the additional cost was prudent and reasonable. If the cost overrun is not prudent, the utility does not recover it.

Senator Kelly asked **Mr. Gale** if MidAmerican has any projects currently where they would use this process? **Mr. Gale** replied not currently. They are building renewables at PacifiCorp. MidAmerican will not be going forward with a gas plant in Idaho. It is just too expensive at this time. If they were to build a coal plant they would definitely use this process and any plant that would have a construction cycle of five years or more would use this. **Senator Kelly** asked **Mr. Gale** what is the benefit to the public when the decision making risk is shifted from the utility to the consumer? **Mr. Gale** responded even though MidAmerican has access to funding they use this process because it is just good public policy. The customer does not make the investment, the shareholders do. **Mr. Gale** stated that this process does not shift risk to the customers. The process is the same whether or not the Commission uses it. The only thing that is shifted is the timing and the customers are at less risk as a result of the process. The regulators are in control of this process and if there is a shift in risk, they will deal with it through the rate making process.

MOTION: **Senator Stegner** made the motion to send **S1123** to the floor with a **do pass** recommendation. **Vice Chairman Pearce** seconded the motion.

Senator Kelly stated that she opposes the motion. They are being asked to put a lot of trust in the PUC to put in place parameters that will protect rate payers in the future. The process shifts the risk from the decision makers and the utilities who should be assuming that risk. It is not a voluntary process for the PUC. The legislation prescribes very clearly that they need to respond to these applications.

Senator Stegner said he views this as an assurance for the utility companies to have an opportunity to have some commitment from the PUC. When things change down the road the PUC can't simply say we disagree. They are more involved in the process which has tremendous value for everyone who benefits from the effort of the utilities.